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INTEREST OF AMICI

The American Civil Liberties Union (ACLU) is a nationwide, non-partisan organization of nearly 300,000 members, dedicated to preserving and protecting the Bill of Rights. The American Civil Liberties Union of Nevada is one of the ACLU's state affiliates. The ACLU established the National Prison Project in 1972 to protect and promote the civil and constitutional rights of prisoners. Thus, the ACLU has a particular interest in the standard to be applied to claims by prisoners that they have been subjected to cruel and unusual punishment in violation of the Eighth Amendment.

The parties have agreed to the filing of this brief, as indicated by their letters of consent filed with the Clerk of this Court.

STATEMENT OF THE CASE

The respondent, a Nevada state prisoner, filed this action under 42 U.S.C. §1983, challenging his involuntary exposure to environmental tobacco smoke (ETS) at the Nevada State Prison in Carson City. Respondent sought damages and injunctive relief, contending that he was forced to double cell with a prisoner who smoked five packs of cigarettes per day and that, despite his repeated complaints to prison officials, he was not moved to another cell. See Joint Appendix (hereinafter "J.A.") at 6.

The magistrate before whom the case was tried viewed the case as stating two Eighth Amendment claims: (1) whether the prison officials were deliberately indifferent to the respondent's then-existing medical symptoms, and (2) whether the respondent had a constitutional right to be housed in a smoke-free environment. After excluding evidence relevant to the potential health

effects of exposure to ETS, the magistrate directed a verdict for petitioners on both claims. See J.A. at 72-73.

The court of appeals affirmed in part and reversed in part, holding that the magistrate should have allowed respondent to attempt to show that he was entitled to injunctive relief on the claim that he was involuntarily exposed to a level of ETS that posed an unreasonable risk of harm to his health. The court of appeals affirmed the district court's dismissal of the damages claim and all other claims for injunctive relief. McKinney v. Anderson, 924 F.2d 1500 (9th Cir. 1991).

This Court vacated the judgment and remanded to the court of appeals for further consideration in light of the intervening decision in Wilson v. Seiter, 111 S.Ct. 2321 (1991). Helling v. McKinney, 112 S.Ct. 291 (1991), as amended, 112 S.Ct. 963 (1992). On remand the court of appeals reinstated its

previous judgment remanding the injunctive claim on the issue of unreasonable risk of harm. The court of appeals noted that its previous opinion dealt with the objective component of the Eighth Amendment. On remand, the court of appeals directed the district court to consider whether respondent had shown a violation of the subjective component of the Eighth Amendment. To do so, respondent would be required to show deliberate indifference under the standard established in Wilson v. Seiter. See McKinney v. Anderson, 959 F.2d 853 (9th Cir. 1992). The petitioners sought certiorari and this Court granted the writ on June 29, 1992.

The respondent has been transferred from the Nevada State Prison and is currently single celled in another facility. In January, 1992, the Nevada Department of Prisons adopted a formal smoking policy that substantially limits smoking and requires

reasonable efforts to accommodate non-smokers in double celled housing areas. See brief of the United States, Appendix. These factual changes have not been considered by the lower courts.

SUMMARY OF ARGUMENT

The only issue before this Court is whether the respondent prisoner should be given an opportunity on remand to demonstrate that he is entitled to an injunction limiting his involuntary exposure to ETS by prison officials. The respondent has been transferred from the Nevada State Prison and is now single celled in another Nevada prison. In addition, subsequent to the first decision of the court of appeals, the Nevada Department of Prisons promulgated a system-wide policy that substantially restricts smoking and provides for efforts to accommodate the housing needs of non-smoking prisoners.

These changes in the facts are highly relevant to whether injunctive relief is appropriate; however, they have never been considered by a lower federal court. For these reasons, this Court should not decide this case on the merits, but should dispose of this case in a manner that allows these new facts to be considered on remand.

If this Court considers the case on its merits, it should affirm the judgment of the court of appeals. The court of appeals correctly remanded this case to allow the respondent to attempt to demonstrate that ETS posed an unreasonable risk to his health, and that the petitioners were deliberately indifferent to that risk. Contrary to the petitioners' argument, the pretrial order in this case framed the issues in a manner consistent with the court of appeals' directions on remand to consider the risk of harm from ETS. In addition, the court of appeals correctly instructed the district

court that the respondent was required to prove the petitioners' deliberate indifference under Wilson v. Seiter, 111 S.Ct. 2321 (1991).

This Court has repeatedly recognized that, when the State takes an individual into involuntary custody, including penal custody, it assumes a corresponding duty to protect the individual's safety. This duty implies an obligation to protect against unreasonable risks of harm. Many kinds of catastrophic harms, such as fire and contagious disease, involve potential harm. For this Court to hold that the Eighth Amendment does not protect prisoners from potential harm, as urged by petitioners, would require a dramatic break with precedent. Instead, this Court should recognize that exposing prisoners to substantial risks of serious harm constitutes cruel and unusual punishment.

The additional arguments of the

petitioners are unpersuasive. The fact that some non-prisoners voluntarily engage in dangerous behavior does not mean that prisoners can be involuntarily exposed to such dangers without offending the Eighth Amendment. In this regard, prisoners and non-prisoners are not similarly situated because the State has an affirmative duty to protect the safety of prisoners, but has no such duty toward non-prisoners.

Finally, the petitioners exaggerate the effects of affirming the decision of the court of appeals. The decision below does no more than allow the respondent an opportunity to present his claim on the merits. In view of the high threshold that this Court has established for demonstrating a violation of the Eighth Amendment, there is no danger that prison officials will be required to protect against nonsignificant threats to prisoner health or safety.

ARGUMENT

I. THIS CASE SHOULD BE REMANDED FOR THE LOWER COURTS TO DETERMINE THE EFFECTS OF RECENT FACTUAL DEVELOPMENTS

The facts of this case have changed fundamentally since the court of appeals issued its first opinion. Respondent, who filed this lawsuit because he was double celled with a heavy smoker at the Nevada State Prison, has been transferred to Ely State Prison, where he is now housed in a single cell. See brief of United States supporting petitioners at 12 n. 6. Indeed, respondent has apparently not been assigned to the Nevada State Prison since early 1991. See respondent's brief in opposition to petition for certiorari at 5.[1] Moreover, four of the five petitioners apparently have responsibilities only at the Nevada State Prison, and have no connection with Ely State

[1] There is no indication in either opinion of the court of appeals that that court was aware of this fact.

Prison. See J.A. at 1-4, 16-17; brief of petitioners at 1.

Respondent does not challenge in this Court the district court's finding, affirmed by the court of appeals, that petitioners did not act with deliberate indifference to his then-existing medical symptoms. See McKinney v. Anderson, 924 F.2d 1500, 1511 (9th Cir. 1991). Nor does he challenge the holding of the court of appeals that he is not entitled to damages. Id. at 1509. Thus, all that remains of this case is respondent's request for an injunction prohibiting petitioners from housing him with prisoners who smoke. See brief of United States at 11. Since respondent is now and has for some time been housed in a single cell at a different prison, this claim may well be moot.[2]

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[2] Since his transfer to Ely, respondent has been temporarily housed at the Nevada State Prison on three occasions, apparently in connection with several lawsuits filed by respondent that are pending in the United States District Court at Reno. These (continued...)

In addition, the court of appeals issued its decision in the context of a prison where smoking was virtually unregulated. See 924 F.2d at 1507. However, on January 10, 1992, the Director of the Nevada Department of Prisons promulgated a system-wide policy that substantially restricts smoking by prisoners and staff, and provides for efforts to accommodate the housing preferences of non-smoking prisoners. See brief of United States, Appendix.

These developments substantially change the complexion of this case, and, as the

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[2](...continued)
temporary retransfers to the Nevada State Prison have apparently lasted approximately three weeks each. However, on none of these occasions has respondent been double celled with a prisoner who smoked in the cell. On the first two occasions, respondent was housed in a single cell. On the third, he was double celled for two days with a prisoner who sometimes smokes; however, consistent with their recently promulgated smoking policy (see brief of United States, Appendix), correctional officials asked this prisoner not to smoke while housed with respondent, and he acceded to their request.

United States points out, impart to it "a decidedly abstract quality." Brief of United States at 12. There are several appropriate courses of action in light of these circumstances. First, the Court could affirm. This would reinstate the order of the court of appeals, and thus allow the district court on remand to consider the effects of the changed facts. Second, this Court could vacate the decision of the court of appeals and remand for that court to consider the changed circumstances. Finally, this Court could dismiss the writ of certiorari as improvidently granted. This would leave standing the decision below remanding the case to the district court, which would give that court the first opportunity to consider the effect of these factual developments.

II. THE COURT OF APPEALS PROPERLY REMANDED THIS CASE TO THE DISTRICT COURT TO ALLOW RESPONDENT TO SHOW AN UNREASONABLE RISK OF HARM TO HIS HEALTH AND DELIBERATE INDIFFERENCE ON THE PART OF PETITIONERS

A. The District Court Did Not Allow Respondent to Present Evidence on the Long-Term Risks to His Health from Exposure to ETS

In remanding this case, the court of appeals noted that the district court had "excluded evidence that did not relate to McKinney's current medical symptoms, including documentation of the potential health effects of exposure to ETS." McKinney, 924 F.2d at 1503. Petitioners argue that this issue was voluntarily excluded by the parties themselves in framing the proposed joint pre-trial order. Brief of petitioners at 47. However, one of the issues to be tried, agreed upon by the parties, was "[h]as McKinney's health been injured by exposure to cigarette smoke, and,

if so, to what extent?" J.A. at 52. This language can certainly be read to include not only harm to respondent's health that is currently causing symptoms, but also harm that has occurred but is not yet apparent.[3]

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[3] The development of cancer is a multi-step process; physical changes may be entirely undetectable prior to the development of the malignancy. See U.S. Department of Health and Human Services, The Health Consequences of Involuntary Smoking 28 (1986):

> Carcinogenesis refers to the process by which a normal cell is transformed into a malignant cell with uncontrolled replication. Carcinogenesis has been conceptualized as a multistage process involving a sequence of alterations in cellular DNA that terminate with the development of a malignant cell. Agents acting early in this sequence are referred to as initiators; those acting later are referred to as promoters. Compounds with both initiating activity and promoting activity have been identified in tobacco smoke.
>
> Carcinogenesis reflects DNA damage; although some repair may take place, biological models have not suggested that there is a threshold of damage that must be exceeded. Rather, carcinogenesis

(continued...)

In the district court respondent, acting pro se, moved for a subpoena to produce at trial an expert witness to testify as to the effects on a non-smoker of close confinement with a heavy cigarette smoker. Appendix to petition for certiorari, No. 91-269, E-1 - E-3. The district court denied that motion. Id. at F-6. Respondent then moved, pursuant to Fed. R. Evid. 706, for appointment of an environmental toxicologist as an expert witness to testify regarding the risks to respondent's health from being housed "in an 8' x 6' room, without ventilation, with a heavy cigarette smoker." Id. at G-1 - G-6. Respondent had located a professor at the University of Nevada School of Medicine who

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[3](...continued)
> has been considered to involve a series of changes, each occurring at a rate dependent on the dose of a damaging agent. Higher doses increase the probability that the entire sequence will be completed, but lower doses may also lead to malignancy.

was apparently willing to act as an expert witness, but respondent stated that he was unable to pay the witness' fees and expenses because he was indigent. Id. The district court denied this motion also. Id. at H-6. As a result, the only witnesses testifying for respondent at trial were his fellow prisoners at the Nevada State Prison. J.A. at 59-60, 66-67, 69-70.

At trial, respondent attempted to introduce into evidence medical literature and other publications regarding the health effects of cigarette smoke. J.A. at 71. The district court refused to admit these materials. Id. at 72-73. The district court then directed a verdict in favor of petitioners. Id. at 73.

Thus, the district court improperly deprived respondent of any opportunity to present evidence of the long-term risks to his health posed by his exposure to ETS, although it was within the scope of the

issues to be tried. Neither respondent nor his prisoner witnesses could testify on this subject, and respondent was not permitted to introduce documentary evidence on the health effects of ETS. For this reason, the court of appeals properly remanded the case to the district court to allow respondent "to present evidence regarding the level and degree of his exposure to ETS and whether that degree of exposure is sufficient to create an unreasonable risk of harm to his health." McKinney, 924 F.2d at 1509.

B. The District Court Did Not Consider Whether Petitioners Were Deliberately Indifferent with Regard to the Long-Term Risks of Respondent's Exposure to ETS

The district court found that respondent had failed to prove that petitioners had acted with deliberate indifference to his then-existing medical symptoms, and the court of appeals affirmed that ruling. McKinney, 924 F.2d at 1511. However, as the United

States points out, the district court did not separately consider whether petitioners were deliberately indifferent with regard to the long-term risks posed by respondent's exposure to ETS. Brief of United States at 25.

In connection with this issue, it is important to note that the district court considered the case before this Court decided Wilson v. Seiter, 111 S.Ct. 2321 (1991). In Wilson, this Court held that establishing an Eighth Amendment violation requires proving both a subjective and an objective component. For conditions of confinement claims, the subjective component of an Eighth Amendment claim requires a showing of deliberate indifference. The district court, acting without the guidance of Wilson, appears to have misapplied the deliberate indifference standard.[4] Thus, the appropriate disposition

[4] It appears that the district court erroneously believed that a showing of deliberate indifference requires that prison officials actually intend to harm the (continued...)

of this case is a remand to the district court for further proceedings in light of Wilson.[5] Because the court of appeals remanded the case to the district court for

[4](...continued)
prisoner. See, e.g., Order Entering Judgment in Favor of Defendants, October 18, 1989, appendix to petition for certiorari, No. 91-1958, at D-6 ("plaintiff must show that the prison officials intentionally exposed him to a known risk or harm and actually intended to harm him") (citing Gorman v. Moody, 710 F. Supp. 1256, 1260 (N.D. Ind. 1989)); D-10 ("nor ... was there any indication that any of the Defendants intentionally chose to inflict harm upon the Plaintiff").

Since the district court's decision, this Court has clearly distinguished the "deliberate indifference" test from the standard articulated in Whitley v. Albers, 475 U.S. 312, 320-321 (1986), which requires that prison officials act "for the very purpose of causing harm." Wilson, 111 S.Ct. at 2326. Therefore, this case should be remanded to the district court for the correct application of the deliberate indifference test to respondent's claim regarding long-term risks from exposure to ETS.

[5] The United States similarly suggests that the Court "may wish to remand for the lower courts to consider in the first instance the subjective component" of respondent's claim. Brief of United States at 25.

this purpose, affirming the judgment below would accomplish that goal. See McKinney, 959 F.2d at 854.

The United States suggests that a finding of deliberate indifference may be foreclosed by petitioners' recent promulgation of a formal smoking policy, and their alleged attempts to accommodate respondent's requests that he not be housed with a smoker. Brief of United States at 25-26. The determination of whether petitioners' attempted accommodations were adequate to foreclose a finding of deliberate indifference is a highly fact-specific one, which necessarily turns on the gravity of the risk that respondent was facing. Moreover, evaluation of the accommodations cannot be divorced from consideration of the security and other administrative concerns raised by petitioners. See Wilson, 111 S.Ct. at 2326 (evaluation of state of mind "depends upon the constraints facing the official") (emphasis

omitted). For these reasons, the bearing of petitioners' attempted accommodations on the issue of deliberate indifference is best considered on remand to the lower courts.[6]

III. EXPOSURE OF PRISONERS TO LEVELS OF ENVIRONMENTAL TOBACCO SMOKE THAT PRESENT AN UNREASONABLE RISK OF HARM CAN CONSTITUTE THE OBJECTIVE COMPONENT OF AN EIGHTH AMENDMENT CLAIM

A. The Right to Personal Safety under the Eighth Amendment Includes Protection from Unreasonable Risks of Harm

The starting point of this Court's review should be the actual holding of the court of appeals below. That court did not hold, as petitioners and their amici imply, that prisoners are entitled to a smoke-free environment, or that occasional exposure to ETS violates the Constitution. Rather, the court of appeals held that "it is cruel and unusual punishment to house a prisoner in an

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[6] The United States appears to agree. Brief of United States at 26.

environment that exposes him to levels of ETS that pose an unreasonable risk of harming his health...." McKinney, 959 F.2d at 854.[7]

The only alternative to the holding of the court of appeals is a per se rule that compelled exposure to ETS, regardless of the intensity and duration of such exposure and the likelihood that it will cause future harm, can never violate the Eighth Amendment absent immediately detectable medical consequences. Petitioners urge this Court to adopt such a rule. See, e.g., brief of petitioners at 8, 18-19, 43. However, this would represent a dramatic break with precedent.

This Court has recognized that "when the State takes a person into its custody and holds him there against his will, the

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[7] See also McKinney, 924 F.2d at 1504 ("compelled exposure to ETS is ... cruel and unusual punishment if it is at such levels and under such circumstances as to pose an unreasonable risk of harm to an inmate's health").

Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being." DeShaney v. Winnebago County DSS, 109 S.Ct. 998, 1005 (1989), citing Youngberg v. Romeo, 457 U.S. 307, 317 (1982). In Youngberg, the Court recognized the existence of a constitutional "right to personal security" that is "not extinguished by lawful confinement, even for penal purposes," and thus acknowledged that "it is cruel and unusual punishment to hold convicted criminals in unsafe conditions." 457 U.S. at 315-316.[8]

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[8] The courts of appeals have uniformly recognized this proposition. See, e.g., Bibbs v. Armontrout, 943 F.2d 26, 27 (8th Cir. 1991), cert. denied, 112 S.Ct. 1212 (1991) ("We have recognized that the intentional placing of prisoners in dangerous surroundings or the manifestation of deliberate indifference to their safety violates the Eighth Amendment"); Cortes-Quinones v. Jimenez-Nettleship, 842 F.2d 556, 558 (1st Cir. 1988), cert. denied, 488 U.S. 823 (1988) ("When prison officials intentionally place prisoners in dangerous surroundings, ... or when they are 'deliberately indifferent' either to prisoners' health or safety, they violate the

(continued...)

The "safety" required by the Eighth Amendment must necessarily include protection from foreseeable risks of harm that have not yet come to pass. Indeed, the very definition of "safety" includes freedom from risk of harm as yet unrealized. See, e.g., Webster's Third New International Dictionary Unabridged (1981) ("freedom from exposure to danger;" "the quality or state of not presenting risks"); American Heritage Dictionary, Second College Edition (1985) ("freedom from danger, risk, or injury").

In Rhodes v. Chapman, 452 U.S. 337 (1981), this Court cited with approval four lower court decisions finding prison conditions to be violative of the Constitution. Id. at 352 n. 17. These cases

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[8](...continued)
Constitution"); Hoptowit v. Spellman, 753 F.2d 779, 784 (9th Cir. 1985) ("[T]he Eighth Amendment entitles inmates in a penal institution to an adequate level of personal safety. This is required because inmates, by reason of their confinement, cannot provide for their own safety").

make clear that the Eighth Amendment protects prisoners from substantial risk of serious harm. For example, in Ramos v. Lamm, 639 F.2d 559 (10th Cir. 1980), cert. denied, 450 U.S. 1041 (1981), the court of appeals affirmed the district court's finding that prison officials' failure to provide adequate protection from assault violated the Eighth Amendment, noting that a prisoner "does not need to wait until he is actually assaulted before obtaining relief." Id. at 572. Similarly, in Gates v. Collier, 501 F.2d 1291 (5th Cir. 1974), the court of appeals affirmed a finding of constitutionally inadequate medical care. In reviewing the facts found by the district court, the court of appeals noted that "[s]ome inmates with serious contagious diseases are allowed to mingle with the general prison population," id. at 1300, although there was apparently no evidence that this had actually resulted in the transmission of disease. See also Morgan

v. District of Columbia, 824 F.2d 1049, 1058 (D.C. Cir. 1987), cited with approval in Wilson v. Seiter, 111 S.Ct. at 2327 (deliberate indifference can be shown by "an obvious unreasonable risk of violent harm").

The United States asserts, without citation to authority from this Court, that the Eighth Amendment "does not, at least as a general rule, apply to potential and distant harms, such as the possibility that an inmate might experience adverse health effects in the future as a result of his exposure to ETS while in prison." Brief of United States at 10.[9] This position, if adopted by this Court, would allow officials to expose prisoners to any risk of illness, injury, or death, without running afoul of

[9] The amici states are more explicit, asserting that "[t]he mere possibility that forced exposure to levels of secondhand smoke will lead to cancer or other disease at some unspecified time in the future does not satisfy the objective component of a cruel and unusual punishment claim." Brief of Hawaii, et al., at 8.

the Constitution until the moment when the threatened harm actually occurs and becomes detectable.

For example, in Hutto v. Finney, 437 U.S. 678 (1978), this Court described conditions for prisoners in punitive isolation in the Arkansas penal system. The Court noted that "[a]lthough some prisoners suffered from infectious diseases such as hepatitis and venereal disease, mattresses were removed and jumbled together each morning, then returned to the cells at random in the evening." Id. at 682-683. The harm threatened by this practice was only "potential;" indeed, there was apparently no evidence in the record that any identifiable prisoner had actually contracted a disease as a result of this practice. However, this fact did not prevent the Court from approving the district court's conclusion that conditions in the isolation cells constituted

cruel and unusual punishment. Id. at 687.[10]

Under the regime proposed by the United States, prison officials could decide that, although dangerous levels of asbestos existed in a prison, removing it would be too expensive, and so it would be left in place. The harm would be "potential," in that officials would not know to a certainty that any given prisoner would actually develop lung disease, and it would be "distant," in that the disease might take years or even decades to develop and become detectable. See Borel v. Fibreboard Paper Products Corporation, 493 F.2d 1076, 1083 (5th Cir. 1973), cert. denied, 419 U.S. 869 (1974) (asbestosis generally does not manifest itself until ten to twenty-five years after exposure; mesothelioma, a form of lung cancer

[10] The United States appears to agree that this practice would violate the Constitution, even in the absence of evidence that disease had actually been transmitted. Brief of United States at 19.

caused by exposure to asbestos, has a similarly long latency period between initial contact and apparent effect). Thus, such conduct by prison officials would not be actionable until a prisoner actually became ill. But see Powell v. Lennon, 914 F.2d 1459, 1463, 1464 n. 10 (11th Cir. 1990) (allegation that prisoner had been exposed to asbestos in his cell states Eighth Amendment claim, even in the absence of present symptoms); Clark v. Taylor, 710 F.2d 4, 14 (1st Cir. 1983) (prisoner's rights violated by compelled exposure to chemical that increased risk of developing bladder cancer after a latency period of fourteen to thirty years).

Similarly, prison officials would be under no duty to remedy conditions that presented a serious risk of fire, as long as no fire had yet occurred. Because even the most egregious fire safety hazards are only a "potential" harm until the moment the

prison starts to burn, the Eighth Amendment would impose no obligations on prison officials until that time. But see Hoptowit v. Spellman, 753 F.2d at 784 ("Prisoners have the right not to be subjected to the unreasonable threat of injury or death by fire and need not wait until actual casualties occur in order to obtain relief from such conditions"); cf. Dimarzo v. Cahill, 575 F.2d 15, 18 (1st Cir. 1978), cert. denied sub nom. Hall v. Dimarzo, 439 U.S. 927 (1978) ("One need not wait for the conflagration before concluding that a real and present threat exists") (footnote omitted) (holding that prisoners had standing to challenge fire safety deficiencies even absent proof that they would inevitably suffer injury or death from fire).

Prison officials might decide, as a cost-saving measure, to use a single needle to vaccinate a number of prisoners, in spite of the knowledge that some of the prisoners

are HIV-positive, and that this practice poses a substantial risk of transmitting the virus.[11] Again the risk would be only potential, because it may happen that no prisoners become infected, and the threatened harm would be distant, in that if a prisoner did become infected, he or she might not become symptomatic for a number of years. See National Academy of Sciences, Confronting AIDS--Directions for Public Health, Health Care, and Research 6 (1986). Thus, under the rule proposed by the United States, such a practice would be immune to constitutional challenge. Indeed, a refusal by prison officials to take any steps to prevent or control tuberculosis or any other infectious disease would not be actionable until some prisoners became infected and developed

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[11] As of 1987, the frequency of transmission of HIV to health care workers via an accidental needle stick with HIV-infected blood was 0.5%. National Institute of Justice, AIDS in Correctional Facilities: Issues & Options 9 (1988).

symptoms. But see Hill v. Marshall, 962 F.2d 1209, 1215 (6th Cir. 1992) (improper medical treatment that increased prisoner's future risk of developing active tuberculosis violated Eighth Amendment, although prisoner had not developed the disease by the time of trial); Tillery v. Owens, 907 F.2d 418, 428 (3d Cir. 1990) ("We find nothing in the Supreme Court's relevant jurisprudence that suggests that conditions as deplorable as those at SCIP may not be held to fall below constitutional standards merely because there has not yet been an epidemic of typhoid fever, an outbreak of AIDS, a deadly fire, or a prison riot"); Glick v. Henderson, 855 F.2d 536, 539-540 (8th Cir. 1988) (prisoner "could have a colorable claim under §1983 if he could show that there is a pervasive risk of harm to inmates of contracting the AIDS virus and if there is a failure of prison officials to reasonably respond to that risk") (internal quotation marks, citation

omitted).[12]

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[12] The lower courts have consistently held that defects in medical care may be remedied before the threatened harm comes to pass. See, e.g., Todaro v. Ward, 565 F.2d 48, 51 (2d Cir. 1977) ("The [district] judge cogently commented that he 'need not wait until an epileptic chokes to death on her tongue,' in the absence of proof that such a catastrophe had actually occurred. He held correctly, we believe, that these deficiencies [in medical care] subjected inmates to grave and unnecessary risks"); Palmigiano v. Garrahy, 443 F. Supp. 956, 973 (D.R.I. 1977), aff'd, 616 F.2d 598 (1st Cir. 1980), cert. denied, 449 U.S. 839 (1980) ("[T]he Court would be remiss in its duty were it to wait until an inmate bleeds to death, or suffers a heart attack which defendants are unequipped to diagnose or treat in an emergency, before it acts" to correct deficiencies in medical care).

The courts of appeals have recognized that other conditions of confinement may violate the Eighth Amendment, although the harm they cause is both "potential" and "distant." See, e.g., Hoptowit, 753 F.2d at 783 (inadequate lighting); Bono v. Saxbe, 620 F.2d 609, 617 n. 12 (7th Cir. 1980) (same); Divers v. Department of Corrections, 921 F.2d 191, 194 (8th Cir. 1990) (lack of exercise); Davenport v. DeRobertis, 844 F.2d 1310, 1315-16 (7th Cir. 1988), cert. denied, 488 U.S. 908 (1988) (same); French v. Owens, 777 F.2d 1250, 1255 (7th Cir. 1985) (same); Spain v. Procunier, 600 F.2d 189, 199 (9th Cir. 1979) (same). In Wilson v. Seiter, 111 S.Ct. at 2327, this Court confirmed that exercise is a "human need" and that deprivation of exercise can violate the Eighth Amendment, citing Spain with approval.

B. The Eighth Amendment Protects Prisoners from Substantial Risks of Serious Harm

Of course prison officials are not required to abate every conceivable risk of harm to prisoners. But the Eighth Amendment is violated when prisoners are subjected to a substantial risk of serious harm. In this analysis, both the likelihood and the gravity of the threatened harm must be taken into account. Thus, for example, conditions that presented a ten per cent chance that a prisoner would develop athlete's foot would not violate the Eighth Amendment, while conditions that presented an equivalent risk of becoming infected with HIV would be unconstitutional. Similarly, a very slight risk of even catastrophic harm would not violate the Eighth Amendment (for example, failing to earthquake-proof a prison located in an area that has never experienced an earthquake).

The standard articulated by the court of appeals--"unreasonable risk of harm to ... health"--is fully consistent with this analysis. However, if this Court sets forth a different legal standard, this case should be remanded to the district court to allow that court to apply the standard to the evidence regarding the long-term risks of exposure to ETS.

IV. THE FACT THAT NON-INCARCERATED PERSONS ARE SOMETIMES EXPOSED TO ETS IS IRRELEVANT TO RESPONDENT'S EIGHTH AMENDMENT CLAIM

Petitioners place great emphasis on the fact that "unincarcerated citizens have no constitutional protection from exposure to ETS." Brief of petitioners at 26; see also id. at 29-31. This, they suggest, precludes a holding that exposing prisoners to ETS can violate the Constitution.

This argument fails to recognize that prisoners and non-prisoners are not similarly situated, and that the Eighth Amendment

confers certain rights upon the former that do not extend to the latter. For example, while "[t]he Constitution imposes no obligation on the States to pay ... any of the medical expenses of indigents," Maher v. Roe, 432 U.S. 464, 469 (1977) (footnote omitted), "the Eighth Amendment's prohibition against cruel and unusual punishment ... requires the State to provide adequate medical care to incarcerated prisoners." DeShaney v. Winnebago County DSS, 109 S.Ct. 998, 1005 (1989). Thus, while it is certainly true that many non-incarcerated persons are denied access to medical care, prison officials may not use this fact to justify refusing medical care to the prisoners in their custody. Similarly, although the state has no constitutional duty to protect non-incarcerated persons from private violence, DeShaney, 109 S.Ct. at 1004, or to provide such persons with adequate housing, Lindsey v. Normet, 405 U.S.

56, 74 (1972), the state unquestionably does have such a duty with regard to prisoners. DeShaney, 109 S.Ct. at 1005-1006 (state must provide "basic human needs--e.g., food, clothing, shelter, medical care, and reasonable safety").

Nor is it relevant that many non-prisoners voluntarily submit to ETS exposure in restaurants and other places. It is clear that such persons cannot, by their own voluntary conduct, waive the rights of prisoners not to be exposed to conditions that seriously threaten their health and safety. For example, many persons voluntarily drink dangerous amounts of alcohol, and others engage in sexual practices that place them at high risk for HIV infection, but petitioners would presumably not argue that prisoners could be compelled to engage in these behaviors.

> [T]he fact that people who are free to do so choose to expose themselves to serious health risks cannot justify the arbitrary,

> involuntary exposure of a prisoner to those risks. It would be absurd to suggest that because people ride with drunk drivers, practice bungee jumping, sky-dive, and ride motorcycles without helmets, a prison official could therefore require an inmate to do so over his objection.

Clemmons v. Bohannon, 956 F.2d 1523, 1533 n. 3 (10th Cir. 1992) (en banc) (Seymour, J., dissenting).[13]

Moreover, there is a significant difference between occasional, fleeting, voluntary exposure to ETS in a restaurant, and the degree of exposure at issue in this case. It was not disputed in the court of appeals, and it is apparently not disputed in this Court, that respondent was confined to a poorly ventilated six-foot by eight-foot cell with a prisoner who smoked five packs of cigarettes a day, and that there was no

[13] Contrary to the assertion of the United States (brief of United States at 10, 20), it is of no relevance that smoking is a lawful activity, as are all the activities enumerated in the preceding paragraph.

restriction on smoking in the prison except in the infirmary and the culinary. McKinney, 924 F.2d at 1507. There is no reason to believe either that this extreme level of exposure is voluntarily tolerated by non-prisoners, or that it is within society's expectations of appropriate conditions for incarcerated persons.[14]

[14] It is difficult to discern the relevance of the observation by the United States that "[t]wo hundred years ago, many of our most revered founding fathers were tobacco farmers." Brief of United States at 20, quoting Caldwell v. Quinlan, 729 F. Supp. 4, 6 (D.D.C. 1990), aff'd, 923 F.2d 200 (D.C. Cir. 1990), cert. denied, 112 S.Ct. 295 (1991). Certainly the fact that many respectable persons are involved in the manufacture of asbestos and pesticides does not mean that prisoners can be exposed to limitless quantities of those substances without implicating the Eighth Amendment. See Powell v. Lennon, 914 F.2d 1459 (11th Cir. 1990) (exposure of prisoner to asbestos may violate Eighth Amendment); Johnson-El v. Schoemehl, 878 F.2d 1043 (8th Cir. 1989) (exposure of prisoners to pesticides may violate Constitution).

V. PETITIONERS AND THEIR AMICI EXAGGERATE THE EFFECTS OF AFFIRMING THE DECISION BELOW

Amici states and the United States predict dire consequences if the decision below is affirmed. The United States fears that restrictions on smoking by prisoners could "increase the likelihood of unrest and antisocial behavior...." Brief of United States at 23. Amici states refer to "the unrest flat bans on smoking produce in the prison environment," brief of Hawaii, et al., at 11, and predict that such a ban would require "more prison guards and other staff to deal with the likely increase in prison unrest." Id. at 2.

However, these predictions appear to have no basis in fact. Although numerous county and state corrections departments, including the Nevada Department of Prisons (see brief of United States, Appendix), as well as the federal Bureau of Prisons (id.

at 15-16), have restricted smoking by prisoners, amici are unable to point to a single incident in which such restrictions have been implicated in prison violence or unrest.

Such unadorned speculation is entitled to no weight:

> It is the business of prison officials, of course, to maintain order within their institutions. But this fact does not support a claim that every step taken to protect constitutional rights of prisoners will lead to a breakdown in institutional discipline or security. Routine and automatic arguments to this effect have been made before and have been rejected by this Court.

Cleavinger v. Saxner, 474 U.S. 193, 207 (1985).

Amici states also fear that affirmance of the decision below will open a "Pandora's box" of "endless numbers of complaints over environmental, nutritional, or programmatic conditions at the Nation's prisons...." Brief of Hawaii, et al., at 8-9; see also

brief of United States at 21 n.16.[15] However, such concerns, mechanically recited by government officials whenever prisoners' rights are at issue before this Court, are exaggerated. The court of appeals held only that "it is cruel and unusual punishment to house a prisoner in an environment that exposes him to levels of ETS that pose an unreasonable risk of harming his health." McKinney, 959 F.2d at 854. That court concluded that respondent stated a valid claim based on the specific facts of his case--confinement in a poorly ventilated six-

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[15] For example, amici states express fear that "[e]verywhere, prison diets ... would come under scrutiny in federal court under the guise of claims challenging conditions as breaching the Eighth Amendment." Brief of Hawaii, et al., at 9. However, this Court has already recognized that providing prisoners a nutritionally inadequate diet can violate the Eighth Amendment. Hutto v. Finney, 437 U.S. 678, 683, 686-687 (1978). See also Campbell v. Cauthron, 623 F.2d 503, 508 (8th Cir. 1980) (jail's daily diet of two sweet rolls, two frozen dinners, and coffee was nutritionally inadequate and violated constitutional standards).

foot by eight-foot cell with a prisoner who smoked five packs of cigarettes a day, in a prison where smoking was virtually unregulated. See McKinney, 924 F.2d at 1507. It does not follow that other prisoners alleging exposure to ETS under different circumstances would be able to state a claim capable of surviving a motion for judgment on the pleadings.[16]

This Court has established a stringent standard for prisoners seeking to show that the conditions of their confinement violate the Eighth Amendment. Such prisoners must show not only that those conditions deny them "the minimal civilized measure of life's necessities," Rhodes v. Chapman, 452 U.S. at

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[16] This Court has made clear that conditions of confinement that might otherwise violate the Eighth Amendment do not do so when prisoners are exposed to them only to a minimal extent. See, e.g., Hutto v. Finney, 437 U.S. at 686-687 ("[a] filthy, overcrowded cell and a diet of 'grue' might be tolerable for a few days and intolerably cruel for weeks or months").

347, but also that prison officials, in allowing those conditions to exist, acted with "deliberate indifference." Wilson, 111 S.Ct. at 2326-2327. This high standard, combined with the availability of judgment on the pleadings and summary judgment, makes extremely unlikely the "Pandora's box" feared by amici states.

CONCLUSION

For all the reasons set forth herein, the judgment of the court of appeals should be affirmed. Alternatively, the writ of certiorari should be dismissed as improvidently granted, or the judgment below vacated and the case remanded for the court of appeals to consider the possible effect of intervening factual developments.

Respectfully submitted,

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